INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:	
Burguieres v. *Farrell*, 126 Tex. 209	8
Cannon v. *Cannon*, 43 S. W. (2d) 134, error dismissed, 121 Tex. 634	7
Douglas v. *Willcuts*, 296 U. S. 1	4, 6
Fitch v. *Commissioner*, 43 B. T. A. 773	5
Helvering v. *Fitch*, 309 U. S. 149	4, 5, 7
Helvering v. *Fuller*, 310 U. S. 69	5
Insurance Co. v. *Independent School Dist.*, 133 Tex. 545	8
Wood v. *Bankers Life & Loan Ass'n*, 132 Tex. 505	8
Statutes:	
Revenue Act of 1934, 48 Stat. 680; Sec. 22 (U. S. C., Title 26, Sec. 22)	2
Revenue Act of 1936, 49 Stat. 1648, Sec. 22	2
Revised Civil Statutes of Texas (1911), Art. 4634	7
Vernon's Texas Civil Statutes (1940 ed.):	
Vol. 4, Art. 1821	8
Vol. 13, Art. 4638	3, 7

46165—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 306

JOSEPHINE S. PEARCE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 34–36) is reported in 42 B. T. A. 91. The opinions of the Circuit Court of Appeals (R. 49–52) are reported in 120 F. (2d) 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 4, 1941 (R. 53). The petition for a writ of certiorari was filed July 24, 1941. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments received by taxpayer under a standard annuity contract purchased for her by her divorced husband in accordance with a pre-divorce agreement are includable in her gross income, or whether they constitute income attributable to her husband because in discharge of his continuing obligation to support taxpayer.

STATUTES INVOLVED

Revenue Act of 1934, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> [U. S. C., Title 26, Sec. 22.]

Section 22 (a) of the Revenue Act of 1936, 49 Stat. 1648, contains provisions identical with the above.

Vernon's Texas Civil Statutes (1940 ed.), Vol. 13, Art. 4638:

> The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

STATEMENT

The taxpayer separated from her husband in 1913 while both were living in New York City (R. 13, 35). A separation agreement was executed in that year, and was amended in 1916 by a supplemental agreement. By virtue of the supplemental agreement, the taxpayer's husband agreed to pay the taxpayer $500 each month for the life of the agreement. It further provided that the agreement would terminate if he deposited with a trustee an annuity contract, issued by a recognized life insurance company, calling for the payment of $500 per month to the taxpayer for life (R. 30). In 1917, the taxpayer obtained a decree of absolute divorce in Texas. The taxpayer's husband entered his personal appearance in the action (R. 14, 35). The court's decree was silent in respect of alimony, any property settlement, maintenance, or the reservation of jurisdiction for such purposes (R. 17). The marriage had been childless (R. 35).

Shortly after the divorce, an annuity contract calling for the payment of $500 per month to the taxpayer during her life was purchased by the taxpayer's former husband in consideration of a single premium of $82,953.53 (R. 15).

In reporting gross income for 1935 and 1936, neither the taxpayer nor her former husband included the $6,000 received by the taxpayer from the insurance company in each of those years. The Commissioner sent deficiency notices to both parties, and both appealed to the Board of Tax Appeals. At the hearings, the Commissioner contended that only the taxpayer should report the payments as income. The Board sustained the Commisisoner's contention (R. 35–36). Mrs. Pearce, the taxpayer herein, appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board (R. 53).

ARGUMENT

1. The conflict alleged is the failure of the court below properly to apply the decisions in *Douglas* v. *Willcuts*, 296 U. S. 1, and *Helvering* v. *Fitch*, 309 U. S. 149. In the *Fitch* case, this Court pointed out that a husband, in order to escape taxation on income from an alimony trust pursuant to the rule of the *Douglas* case, must sustain the burden of showing that he was completely discharged under the applicable state law. Since Fitch was unable to dispel the Court's uncertainty respecting the

state law, he was held liable for the taxes imposed on the trust income received by his wife. Where there is no doubt under state law, however, that the husband has been completely discharged, he does not pay the taxes on the trust income. *Helvering* v. *Fuller,* 310 U. S. 69; *Fitch* v. *Commissioner,* 43 B. T. A. 773.

When the Commissioner determines that a husband is liable for such taxes, the burden is placed on the husband to show by "clear and convincing proof" in an appropriate proceeding that his obligation to support has been fully and finally discharged. *Helvering* v. *Fitch, supra.* Conversely, when the Commissioner has determined that the wife should pay the taxes and she contests such determination, the rule of the *Fitch* case would seem to require that she demonstrate by "clear and convincing proof" that her husband was not fully and finally discharged.[1] In short, the rule of the *Fitch* case seems simply an outgrowth of the familiar requirement that the contesting taxpayer must sustain the burden of establishing his position. Thus, in the instant case, the court below correctly held that Mrs. Pearce must pay the taxes because she failed to show that her husband was not discharged by the

[1] It may be suggested that the result is harsh since the state law is rarely likely to be explicit and the Commissioner has his choice of which of the two parties to tax. But cf. *Helvering* v. *Fuller,* 310 U. S. 69; *Fitch* v. *Commissioner,* 43 B. T. A. 773.

settlement. The terms of the instrument itself purport to relieve him of liability upon purchase of the annuity (R. 27–31). The Board of Tax Appeals and all the judges of the court below have stated that the law of Texas is so uncertain that one can only speculate concerning the power of Texas courts to affect a husband's liability to support many years after the granting of a divorce (R. 36, 52). Therefore, Mrs. Pearce has failed in the proof necessary to the success of her action.

2. Even assuming that, since both the taxpayer and the former husband petitioned for redetermination of the deficiencies,[2] the conflicting presumptions which arose eliminated each other and put the issues before the Board for decision without them, it is submitted that the Board's decision was correct. The general rule is naturally that one who in fact receives income must pay the tax on the income. But if the income discharges an obligation of another person, it will be attributed for tax purposes to the obligor, under the rule of *Douglas* v. *Willcuts*, 296 U. S. 1. The taxpayer in the instant case has referred (Pet. 13, 14) to "the general rule" of that case. She contends that the Commissioner had the burden of showing that the

[2] The Commissioner took the position that Mrs. Pearce was the proper person to pay the taxes, but in order to protect the Government's interest (R. 35, 50), he asserted the deficiency against both parties.

annuity payments were not received in discharge of the husband's continuing obligation. The general rule of the *Douglas* case, however, is not called into operation unless there is a continuing obligation, which warrants attributing receipt of the payments to one who does not actually receive them. There has been no showing here that there was a continuing obligation.[3] The Board, there-

[3] Although it is the contention of the Commissioner that the Texas courts have no power to require a divorced husband to make additional contributions and that Mr. Pearce was completely discharged, at the very least sufficient doubt exists regarding the Texas law to justify classifying the instant case in this respect with *Helvering* v. *Fitch*, 309 U. S. 149, and thus imposing the burden on the taxpayer. The applicable Texas statute contains no reference to a continuing liability of a husband for the support of his wife. Vernon's Texas Civil Statutes (1940 ed.), Vol. 13, Art. 4638, *supra*. This statute has been unchanged during the entire period involved herein. See Revised Civil Statutes of Texas (1911), Art. 4634. The only case cited by the taxpayer in support of the claim that the courts retain power to award support to a wife or to amend a decree in that respect, except where community property had not been correctly divided at the time of the divorce, is *Cannon* v. *Cannon*, 43 S. W. (2d) 134 (Civ. App. San Antonio), error dismissed 121 Tex. 634. In the *Cannon* case, it was clearly indicated that there was no continuing obligation on the part of the husband. The taxpayer cites the *Cannon* case on the theory that the dismissal of the writ of error meant disagreement with the reasoning of the lower court. But such a dismissal is ambiguous: It may signify either lack of jurisdiction or disagreement with the reasoning, though not the result, of the lower court. It is more likely that it meant the former. See *Burguieres* v. *Farrell*, 126 Tex. 209; *Insurance Co.* v.

fore, correctly affirmed the Commissioner's determination that she was liable for the taxes on the income which was actually paid to her.

CONCLUSION

The decision below is correct and there is no conflict; therefore, the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
MICHAEL H. CARDOZO, IV,
Special Assistants to the Attorney General.

AUGUST 1941.

Independent School Dist., 133 Tex. 545; *Wood* v. *Bankers Life & Loan Ass'n*, 132 Tex. 505; Vernon's Texas Civil Statutes (1940 ed.), Vol. 4, Art. 1821, Subdivision 3.

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